No. 92-1964

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
HEALTH CARE & RETIREMENT CORPORATION OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

MARSHA S. BERZON
SCOTT KRONLAND
177 Post Street, Suite 300
San Francisco, CA 94108

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 84 national and international unions with a total membership of approximately 14,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

The question in this case is whether, as the National Labor Relations Board has consistently determined, health professionals are *not* within the class of "supervisors" delineated by § 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11), because the health care profes-

sional's responsibilities include giving on-site job direction to less-skilled employees as an incident of patient care. As this Court indicated in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Board's decisions on this question "accurately capture the intent of Congress." *Id.* at 690.

1. The "supervisor" definition contained in § 2(11) is in several respects ambiguous and in others rife with potential internal contradictions. In particular, the term "in the interest of the employer" has no immediately apparent meaning, since on one level every employee, supervisory or otherwise, acts "in the interest of the employer" as to work tasks generally. Similarly, since no individual can, under the definition, be a supervisor unless he or she performs the activities covered by the definition with authority "not of a merely routine or clerical nature but [with] . . . the use of independent judgment", the statutory terms "*responsibly* to direct" and *effectively* to recommend" (emphasis supplied) must mean something more than simply applying judgment and discretion, although the precise meaning of those terms is not clear from the face of the statute. These problems of construction are exacerbated when § 2(11) is read in conjunction with the immediately succeeding section, § 2(12), defining "professional employee."

2. The legislative history of the Taft-Hartley Act, which added both § 2(11) and § 2(12) to the NLRA, is of substantial aid in pointing the way toward a rational interpretation of those sections. That history shows that Congress was legislating against a background of Board cases holding that only "true" foremen and higher officials are supervisors for NLRA purposes, while "leadmen", "strawmen", and various other lower-level employees with minor supervisory authority over other employees are not. The intent in 1947 was to preserve that general distinction, an intent necessarily leaving a great deal to the

Board's expert judgment on questions of degree in particular factual situations.

3. Following the enactment of Taft-Hartley, the Board continued to hold that limited day-to-day direction by higher skilled employees of lesser skilled employees, does not necessarily make the individual in question a § 2(11) supervisor. And, following the 1947 Congress' lead, the weight of the court of appeals opinions is that to be within § 2(11) the individual in question must in some meaningful sense share the power of management.

4. The Board, with court approval, applied this approach to the health care industry shortly before the 1974 amendments adding nonprofit hospitals to the coverage of the NLRA—holding that direction given to other employees in the exercise of professional discretion incidentally to the professionals' care of patients does not trigger supervisory status. As a result of those rulings both congressional committees concluded that there was no need to clarify the NLRA to assure that health care professionals would continue to be classified as "employees," not as "supervisors".

5. In light of the legislative history of the statute, this Court was correct in *Yeshiva* in approving the Board's construction of the ambiguous statutory terms so as to maintain the distinction between true supervisors and individuals with minor authority to direct other employees.

ARGUMENT

Section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11), defines the term "supervisor" for the purposes of the Act. And, NLRA § 2(3), which delineates the "employees" covered by the Act, excludes "any individual employed as a supervisor." The National Labor Relations Board, in applying § 2(11) to nurses and other health care professionals, has consistently concluded that on-site job-task direction of less-skilled employees in the exercise of professional judgment and as an incident of patient care, standing alone, does *not* make the individual a "supervisor." The precise question in this case is whether this administrative interpretation of the statute is rational and consistent with the Act, and therefore entitled to judicial respect and enforcement. *See e.g., Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978).

NLRB v. Yeshiva University, 444 U.S. 672 (1980) all but requires that this question be answered "yes." The *Yeshiva* Court noted that, in general, the Board holds "professional employees" to be "supervisors" only "if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals" and, in particular, "[i]n the health-care context the Board asks in each case whether the decisions alleged to be . . . supervisory are 'incidental to' or 'in addition to' the treatment of patients." *Id.* at 690 & n.30. The decisions so holding, the *Yeshiva* Court stated, "accurately capture the intent of Congress." *Id.*[1]

As we now show there is no ground for believing that the *Yeshiva* Court erred in this regard.[2] Certainly the

[1] *Yeshiva* also noted that the Board approach here at issue is one "Congress expressly approved in 1974. S. Rep. No. 93-766, p. 6 (1974) . . ." 437 U.S. at 690 n.30.

[2] The exact issue before the Court in *Yeshiva* involved the implied "managerial employee" exception to the coverage of the NLRA (*see NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974)), not the express supervisors' exception. The cases cited by the Board in *Yeshiva* with regard to the limitations on the managerial exclusion were, however, cases concerning supervisors, and it is those cases that the Court said "accurately capture the intent of Congress."

statutory materials yield *no* basis for disapproving the Board's approach already once approved in *Yeshiva*. To the contrary, those materials confirm that when Congress in 1947 expressly excluded supervisors from the coverage of the Act and expressly covered professional employees, the Legislature did not structure the class of § 2(11) supervisors to include all individuals with some supervisory authority in the colloquial sense, but only a subgroup thereof—*viz.*, individuals, such as traditional industrial foremen and higher supervisors, who are, in the words of the *Yeshiva* Court, truly "aligned with management" (444 U.S. at 690) as to those matters central to the NLRA's scheme.

Two statutory sections are principally pertinent to the task at hand. The first is, of course, § 2(11) itself, which provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

The second relevant provision is the definition of "professional employee" in § 2(12) of the Act. That section makes clear that the NLRA covers those individuals who do work that is "varied in character as opposed to routine mental, manual, mechanical or physical work" and that "involv[es] the consistent exercise of discretion and judgment in its performance," as well as individuals who have completed their formal professional training but are working "under the supervision of a professional person to

qualify . . . to become a professional employee." *See also* NLRA § 10(b)(1), 29 U.S.C. § 160(b)(1) (providing that professional employees shall not be included in a unit with other employees "unless a majority of such professional employees vote for inclusion in such unit.")

To aid in determining whether the Board's view of the interaction of these two provisions in the health care context is indeed, as *Yeshiva* indicated, a reasonable interpretation of the statute, we begin with the statutory language and structure and then consider the pertinent legislative materials.

1. *Statutory language and structure*: (a) The "supervisor" definition contains numerous terms whose import is not immediately apparent, either viewed in isolation or in the context of the definitional section as a whole.

First, exercises of supervisory authority must be "in the interest of the employer." Literally then, § 2(11) states that even if an individual is empowered to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them", he or she is *not* a supervisor unless that power is exercised "in the interest of the employer." To make sense of the supervisor definition, then, there must be some situations in which an individual who has the requisite authority and otherwise meets the "supervisor" definition is *not* a statutory supervisor because the authority is *not* exercise "in the interest of the employer". Otherwise, the phrase "in the interest of the employer" becomes surplusage. Cf. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 111 S.Ct. 2166, 2172 (1991) (statutes should be construed to avoid rendering superfluous any parts thereof); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (same).

To posit that a person with the enumerated statutory supervisory powers could have the authority to exercise those powers *other* than "in the interest of the employer" appears on one level paradoxical: The critical role of the

"supervisor" definition in the statute is the exclusion of "any individual *employed* as a supervisor" (§ 2(3) (emphasis supplied)) from the coverage of the statute. Thus, the supervisors with which the statute is concerned will ordinarily be common law employees of the employer. If the phrase "in the interest of the employer" is read simply to mean "not in the supervisory employee's personal interest" or "in the personal interest of some individual or some entity other than the employer," [3] it is difficult to envisage any common law employee's actions in his role as an employee—at least unambiguous, employment-specific actions such as hiring, transferring, or otherwise changing the status of other employees [4]—that are not actions "in the interest of the employer." Indeed, "[t]he entire work force from the president down to the messenger boy in one sense acts in the interest of the employer as Congress well knew." *International Union of United Brewery v. NLRB*, 298 F.2d 297, 303 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 843 (1962).

To avoid that paradoxical conclusion, the "in the interest of the employer" qualifying term in § 2(11) must have some meaning and some function other than simply

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[3] Put another way, it is certainly the case that supervisors, like other employees, sometimes *abuse* the authority granted by their employer by acting in their own interest rather than that of their employer. For example, supervisors on occasion hire individuals known to be incompetent, because the individuals are relatives, or discharge competent subordinates because of purely personal grudges. But the statute is written in terms of "authority" and "exercise of authority". And, employers do not, as far as we are aware, give supervisors "authority" to act other than in the employer's interest.

[4] As to other kinds of activities, it is certainly true that individuals can do something not "in the interest of the employer" even while on work time, as the common law doctrine of respondeat superior recognizes. *See* William L. Prosser, *Handbook of the Law of Torts* § 69 (3d ed. 1964). It is difficult to understand, however, how someone could while employed hire or discharge or lay off other employees *not* in the employer's interest in the respondeat superior or agency sense.

to assure that the acts in question are taken in the course of the putative supervisor's assigned employment tasks. *Id.; see also NLRB v. Security Guard Service, Inc.*, 384 F.2d 143 (5th Cir. 1967).

Second, as to all of the enumerated supervisory powers, "the exercise of such authority [must be] not of a merely routine or clerical nature, but [such as] requires the use of independent judgment." Moreover, while most of the specific powers giving rise to supervisory status—the authority to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline"—are stated unqualifiedly, two of the enumerated powers give rise to supervisory status only under certain circumstances. Thus, direction of other employees, standing alone, does not give rise to supervisory status; rather, to be a supervisor, the individual must have authority "*responsibly* to direct" (emphasis supplied). Similarly, where the individual in question cannot exercise any of the enumerated powers directly, mere recommendation of action in any of those enumerated areas is insufficient to give rise to supervisor status. Rather, an individual is a supervisor only if his or her authority is to recommend "*effectively*" (emphasis supplied) the hiring, firing, suspension, or discipline, for example, of other employees. The interaction of these various phrases gives rise to various problems of interpretation.

Both "responsibly" and "effectively" are open to more than one interpretation. In isolation, "responsibly", for example, could mean that the individual is "responsible", in the sense of answerable, for the directions given, and is not merely a conduit for directions originated by others. This interpretation, however, would not make sense in the context of § 2(11) as a whole. As noted above, the last phrase of the section provides, expressly and separately, that "independent judgment" must be exercised. Consequently, to avoid redundancy, "responsibly" must mean something other than exercising "independent judgment."[5]

[5] For this reason, one court of appeals construction of "responsibly to direct" in § 2(11)—"[t]o be responsible is to be answerable for the discharge of a duty or obligation [and] includes judgment, skill, ability, capacity and integrity" (*Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir.), *cert. denied*, 338 U.S. 899 (1949))—must be rejected as inconsistent with § 2(11) as a whole.

"Effectively", similarly, could mean that the putative supervisor's decision has *some* independent impact, and is not the mere transmittal or recording of facts routinely taken into account in making personnel decisions. Such an interpretation, however, would again create a redundancy when read in conjunction with the last, "not merely of a routine nature independent judgment" phrase. "Effectively to recommend such action," then, must refer to *determinative* decisionmaking authority as to the kind of personnel matters covered by § 2(11).

Further, since "effectively to recommend such action" applies to *all* the kinds of actions covered by § 2(11), the "supervisor" definition in terms covers both "responsibly directing" other employees and "effectively recommending" to other employees how to carry out their tasks. Again, it must be that "responsibly" and "effectively" have different meanings under the statute; otherwise, the statutory language would be hopelessly redundant. Moreover, one would expect Congress to use the same word in the same statute to convey an identical meaning; where different words are used, the rational inference is that different meanings are intended. Thus, "responsibly to direct" must also mean something more than giving directions that are in fact followed by other employees.

Third, while it is reasonably evident what terms such as "hire", "lay off", "recall" and "promote" mean, at least two of the enumerated authorities of supervisors—"transfer" and "assign"—have no inherent meaning outside of a particular industrial context. One would think that, like the other terms listed immediately before and after—*viz.*, "hire, . . . suspend, lay off, recall, promote, discharge, reward, or discipline"—"transfer" and "assign" both refer to a change of an employee's status of some

substantive significance, and of a nontransitory nature. Moreover, since the "supervisor" definition also covers direction of other employees (but not, as noted above, *all* direction of other employees), "transfer" and "assign" must for that reason as well be read to apply to basic *changes* in employment responsibilities, and not simply to day-to-day direction of employees as to the task to be performed.[6]

In sum, the statutory definition of the term "supervisor" is imprecise in several respects. In particular, "in the interest of the employer" must have some meaning other than simply advancing the employer's interests, but that meaning cannot be gleaned from the statutory language alone. And, the definition's applicability to individuals who simply give day-to-day directions to other employees but do not have any of the other indices of supervisory status is, on the face of things, quite limited. For the section as a whole makes it plain that it is not enough to confer supervisory status that the putative supervisor's directions must be followed, or that those directions be nonroutine and involve the exercise of independent judgment. But the bare statutory words do not yield a precise line of demarcation.

(b) Adding to the ambiguity of the "supervisor" definition standing alone is the fact that the Act explicitly covers professional employees, and defines such employees as, *inter alia*, individuals whose work is *not* "routine"

[6] For example, the job "assignment" for a nurse's aid might be to work in a certain nursing home location on a certain shift taking care of patients' physical needs. The precise patients the aid takes care of on a given day can be changed, at the direction of a professional, without in any meaningful sense changing the aid's job "assignment". Similarly, since the aid's duties are necessarily varied, to direct the aid on one day to move patients and on another to change bedclothes is not either to transfer or to reassign that employee. On the other hand, ordering the aid to work at another location across town would, in ordinary parlance, be a "transfer", while altering the aid's shift would be to "assign" the employee anew.

and "involv[es] the *consistent* exercise of discretion and judgment in its performance" (§ 2(12)(a)(i)) (emphasis supplied)). Because professionals are defined in this way, a wooden application of § 2(11) to professionals could eliminate any role for the "not of a merely routine nature/independent judgment" proviso otherwise central to § 2(11). Put another way, if precisely the sort of professional judgment and discretion that brings an employed individual within § 2(12) is sufficient standing alone to take the same individual out of the statute under § 2(11), the inclusion of § 2(12) is rendered all but negatory.

Further, since professionals are necessarily primarily responsible for the end-product of their work, the phrase "responsibly to direct" as applied to professionals cannot mean simply that the employed individual in question is responsible, in the sense of accountable or liable either within the enterprise or outside it, for the work of the directed employee. An attorney, for example, is responsible to his clients and to the court, in both an ethical and a liability sense, if a brief is improperly filed or not filed on time because of a mistake by a clerical employee. *See* Model Rules of Professional Conduct Rule 5.3 (1983).

It is no answer to these observations to note that professionals who have nothing whatever to do with "hire, transfer, suspen[sion], lay off, recall, promot[ion], discharge, assign[ment], reward, . . . discipline or [direction]" of other employees would still be covered by § 2(12) and by the statute, even though they exercise judgment, discretion and responsibility in their work. Few professional employees work in isolation, without some assistance from other employees. As just noted, lawyers have secretaries to assist them; engineers and architects have draftspersons; doctors in hospitals have both clerical assistance and patient care assistance; scientists work with laboratory and other technical assistants. *See generally* Matthew W. Finkin, *The Supervisory Status of Professional Employees*, 45 Fordham L. Rev. 805 (1977).

Indeed, the statutory definition of "professional employees," on its face, recognizes the need for such assistants. Since, according to § 2(12), "professional[s]" do *not* predominantly do "routine mental, manual, mechanical or physical work", and since accomplishing most professional tasks involves a goodly measure of such work, Congress must have contemplated that someone other than the professional employee was doing that work. And, unless Congress was of the view—which it assuredly was not—that secretaries type and file briefs without close direction from an attorney, or that draftspersons are not directed by engineers in producing blueprints, Congress could not have intended a reading of § 2(11) that would so overlap § 2(12).[7]

2. *Legislative History*: The legislative history of the the Labor Management Relations Act of 1947 ("LMRA" or "Taft-Hartley Act") with regard to the exclusion of "supervisors" and the coverage of "professional employees" is of substantial aid in clearing up the apparent ambiguities and internal tensions in the Act with regard to the reach of the "supervisor" definition. That history confirms that Congress did not intend to exclude as "supervisors" employees who have some role in giving direction to other employees but are not "aligned with management" (*Yeshiva, supra*, 444 U.S. at 690) to the same degree as traditional industrial foremen.[8]

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[7] It is important to be clear that we are *not* arguing that Congress intended a special application of § 2(11) for professional employees. To the contrary, our point is that the express definition of professional employees and the manner in which such employees are defined throws a critical light upon the appropriate construction of § 2(11) as applied to *all* kinds of workers.

[8] This Court has on several other occasions surveyed the legislative history of § 2(11) of the Act. *See NLRB v. Bell Aerospace, supra*, 416 U.S. at 277-285; *Beasley v. Food Fair of North Carolina*, 416 U.S. 658, 658-662 (1974); *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 181-184 (1981). Since none of those cases directly involved an application of the "supervisor" definition, the emphasis in these earlier accounts is somewhat different at points from that here.

(a) To understand what Congress intended when it enacted the "supervisor" definition in § 2(11), one must begin with the legal background against which Congress legislated. Section 2(3) of the Wagner Act defined "employee" simply as

> any employee . . . but . . . not . . . any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

Within a few years after passage of the Act the Board was confronted with questions as to the applicability of the Act to supervisory employees.

Initially the Board concluded that supervisory employees were covered by the Act, and accordingly were protected in their right to unionize. *Union Collieries Coal Co.*, 41 NLRB 961 (1942); *Godchaux Sugars, Inc.*, 44 NLRB 874 (1942). In *Maryland Drydock Co.*, 49 NLRB 733 (1943), however, the Board reversed course and held that it would refuse to certify bargaining units composed of supervisors.

Shortly thereafter, the Board set out its general test for determining supervisory status:

> As a general rule, it is our policy to exclude from the appropriate unit employees who supervise or direct the employees therein, and who have authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of such employees, or whose official recommendations concerning such action are accorded effective weight. [*Douglas Aircraft Co.*, 50 NLRB 784 (1943). *See* Eighth Annual Report of the National Labor Relations Board ("Eighth Annual Report") 57 (1943).]

The short-hand *Douglas Aircraft* test, which described supervisory employees as those "with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action," was followed in numerous cases. ***See, e.g., Elec-***

tric Auto-Lite Co., 50 NLRB 1006, 1008 (1943); *Heckman Furniture Co.*, 50 NLRB 834, 837-38 (1943); *E.I. du Point de Nemours & Co.*, 53 NLRB 473, 476 (1943).

In applying this test, the Board consistently distinguished between employees who were "true" supervisors and those who merely performed some supervisory duties. *See, e.g., Lockheed Aircraft Corp.*, 50 NLRB 958, 960-61 (1943) (holding that although firemen "supervise auxiliary firemen" they had no power to "affect the employee status of the auxiliary firemen," and were therefore not true supervisors); *Colonial Press, Inc.*, 50 NLRB 823, 826 (1943) (finding that "working foreman" did not possess "sufficient supervisory authority" to warrant excluding him from bargaining unit); *The Arundel Corp.*, 53 NLRB 466, 470-71 (1943) (finding that a "journeyman machinist, who at times directs and is assisted by helpers according to a custom long prevailing in the machinists' craft" was not a true supervisor); *Douglas Aircraft Co.*, 53 NLRB 486, 491-92 (1943) (finding that certain "leadmen" described as "working employees who are in charge of from 4 to 12 men" were not supervisory employees); *Byron-Jackson Co.*, 53 NLRB 528, 532 (1943) (finding that "leadmen," each of whom "has from 3 to 25 employees under him," were not supervisory employees.)

In March of 1945, in *Packard Motor Car Co.*, 61 NLRB 4 (1945), the Board reconsidered the entire question of whether supervisors had organizational rights under the Act and held, once again, that they did. Nevertheless, "[t]he *Packard* decision did not affect the Board's long-established rule that supervisory employees who are vested with the authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, are not properly included in bargaining units comprising their subordinates." Tenth Annual Report 34 (1945). Thus, the Board still had the same need to distinguish supervisors from other employees. And until the Taft-Hartley Act was promulgated, the Board adhered to its established test for determining supervisory status. *See* Eleventh Annual Report 31 (1946); Twelfth Annual Report 21-22 (1947).

During this period, the Board continued to distinguish employees who possessed true supervisory authority from leadmen, "strawmen", craftspersons with assistants, and others whose work only involved minor supervisory functions, and continued to rule that the latter were not supervisors for NLRA purposes. For example, in cases that would subsequently be cited with approval in the legislative history of the LMRA, the Board held that the following employees were not supervisors: (1) "Timekeeper Leaders A" who each "direct[ed] the work of from 6 to 20 timekeepers and timekeeper leaders B," *Bethlehem Sparrows Point Shipyard, Inc.*, 65 NLRB 284, 286-7 (1946); (2) two "planning and production department" employees who were classified as "supervisors" by their employer and had assistants, *id.* at 288; (3) "group leaders" who "instruct and assign material to men who work under them in groups from 1 to 40," *Pittsburgh Equitable Meter Co.*, 61 NLRB 880, 882 (1945); (4) "so-called foremen and assistant foremen" who "spend part of their time supervising and the balance in assisting in getting out the work," *The Richards Chemical Works, Inc.*, 65 NLRB 14, 16 (1945); and (5) "[s]o-called 'supervisory employees'" who "direct from one to six employees" and whose "duties are to keep production moving on schedule and to inspect and control the quality of work . . . ." *Endicott Johnson Corp.*, 67 NLRB 1342, 1347 (1946).

(b) The Taft-Hartley Act started in the House as the Hartley bill, reported by the Education and Labor Committee after 31 days of hearings. The Committee Report accompanying the Hartley bill (H.R. Rep. 245, 80th Cong. 1st Sess. (1947)) traced the history of the Board's treatment of foremen, and decried at length the evils that flow "when the *foremen* unionize." *Id.* at 14, *re-*

printed in NLRB, Legislative History of the Labor-Management Relations Act, 1947 ("Leg. Hist.") 305 (1985) (emphasis supplied). The Committee concluded that:

> If management is to be free to manage American industry as in the past and to produce the goods on which depends our strength in war and our standard of living always, then *Congress must exclude foremen from the operation of the Labor Act*, not only when they organize into unions of the rank and file and into unions affiliated with those of the rank and file, but also when they organize into unions that claim to be independent of the unions of the rank and file. [*Id.* at 306; emphasis in original.]

The Hartley bill passed the House after several days of debate. Neither the House Report nor any statements on the floor of the House made any mention of a disagreement with the Board's definition of supervisor insofar as that definition excluded those employees who perform some secondary supervisory functions, but only with the Board's decision to certify bargaining units of *foremen* and of certain categories of "confidential" and labor relations employees.

(c) While the House was at work on the Hartley bill, the Senate Committee on Labor and Public Welfare, chaired by Senator Taft, had before it a labor bill introduced by the chairman. After six weeks of hearings, the Committee reported a bill to the floor which, like the Hartley bill, sought to overturn *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1949) (upholding the Board's extension of organizing rights to supervisors) by treating supervisors as "management" and thus removing them from the protection of the NLRA.

The Senate Committee bill defined supervisor as follows:

> (11) The term 'supervisor' means any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees,

> or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. [Leg. Hist. at 104.]

The Senate Committee Report explained that:

> In framing this definition, the committee exercised great care, desiring that the employees herein excluded from the coverage of the act be *truly supervisory*.
>
> * * * *
>
> In drawing an amendment to meet this situation, the committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act. *It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action. In other words the committee adopted the test that which the Board itself has made in numerous cases when it has permitted certain categories of supervisory employees to be included on the same bargaining unit with the rank and file.* (*Bethlehem Steel Company, Sparrows Point Division*, 65 N.L.R.B. 284 . . . *Pittsburgh Equitable Meter Company*, 61 N.L.R.B. 880 . . . *Richards Chemical Works*, 65 N.L.R.B. 14 . . . *Endicott-Johnson*, 67 N.L.R.B. 1342, 1347.) [Leg. Hist. at 410, 423; emphasis supplied.][9]

In introducing the Committee bill, Senator Taft emphasized that the purpose of the provision regarding supervisors was to reverse the Board's decisions regarding *foremen*, and that the Committee's "definition of foremen is applied to persons who are strictly foremen . . . .

[9] The cases cited in the Senate Report are discussed, *supra*, at pp. 14-15.

[not] any of the others about whom controversy has arisen." *Id.* at 1009.

Senator Ellender likewise explained that the point of the supervisors provision was to overrule *Packard Motor* which, he stated, would permit "even the vice presidents working for a large corporation . . . [to] compel their employer to recognize them." Leg. Hist. at 1064. In a colloquy with Senator Aiken, Senator Ellender emphasized the narrowness of the provision and the lack of any intention to interfere with the Board's established tests for interfering with the determination of supervisory status:

> Mr. AIKEN. The Senator will recall and I think it should be in the Record, that the definition of a supervisory employee was considerably changed in committee. As originally written into the bill, it included . . . many other types of workmen, who very clearly were not supervisors.
>
> Mr. ELLENDER. The Senator is correct.
>
> Mr. AIKEN. The committee then more closely defined the word 'supervisor', *to include supervisors in fact, rather than all the other groups of employees whom some employers would have liked to have had included in the list of supervisory employees,* so that such employees would not be able to join the union and gain the benefits of the Labor Relations Act.
>
> * * * *
>
> Mr. AIKEN. In dozens of cases labor wanted nothing whatever to be done, while industry wanted to include in the definition of 'supervisor' any number of occupational employees who had no business whatever being included in the definition of 'supervisor.' The Committee simply had to work out for itself what it thought was a proper definition of a supervisor.
>
> Mr. ELLENDER. The Senator is correct.
>
> * * * *
>
> Mr. ELLENDER. Let me state to the distinguished Senator that *the definition adopted by our committee is the one that has been put into practice for several years last past by the NLRB.* [Leg. Hist. at 1064-65; emphasis supplied.]

Senator Ellender later stated again on the Senate floor that "[t]he description of a supervisor as written in the bill is practically the same used by the NLRB for the past 5 or 6 years." *Id.* at 1068.

The Committee's version of § 2(11) was altered prior to passage by an amendment offered by Senator Flanders to add the words "or responsibly to direct them" after the word "employees." Leg. Hist. at 1303. Senator Flanders explained the purpose of the added language:

> As an employer for many years past, and until I resigned to enter this body, I can say that the definition of "supervisor" in this act seems to me to cover adequately everything except the basic act of supervising. Many of the activities described in paragraph (11) are transferred in modern practice to a personnel manager or department. The supervisor may recommend more or less effectively, but the personnel department may, and often does, transfer a worker to another department on other work instead of discharging, disciplining or otherwise following the recommended action.
>
> In fact, under some modern management methods, the supervisor might be deprived of authority for most of the functions enumerated and still have a large responsibility for the exercise of personal judgment based on personal experience, training and ability. He is charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives instructions for its proper performance. If needed, he gives training in the performance of unfamiliar tasks to the worker to whom they are assigned. *Such men are above the grade of "straw bosses, lead men, set-up men, and other minor supervisory employees," as*

enumerated in the [Senate Committee] report." Their essential managerial duties are best defined by the words, "direct responsibly," which I am suggesting. [*Id.* at 1303, emphasis supplied.]

The proposed amendment was immediately accepted by Senator Taft, who stated that it "merely adds to the definition of the word 'supervisor.' The definition in the bill is that which has been used by the National Labor Relations Board for the past 4 or 5 years; but I have no objection certainly to including the words 'or responsibility [sic] to direct them.'" Leg. Hist. at 1304. The amendment passed by voice vote without further debate. *Id.* As a result, perhaps, of an error in enunciation or transcription, the amendment as it passed the Senate read not "responsibly to direct," as first stated by Senator Flanders, but "responsibility to direct." H.R. 3020 as Passed Senate, § 2(11), Leg. Hist. at 232.

(d) The differences between the House and Senate bills, including the differences in the definition of "supervisor", were submitted to a Conference Committee. In conference, the Senate prevailed on the scope of the "supervisor" provision, and the Senate provision was incorporated into the Conference Committee report with a single, unmentioned change—the term "responsibility to direct" in the Senate bill as finally enacted was changed to "responsibly to direct." Leg. Hist. at 508. In a written summary inserted into the Congressional Record, Senator Taft reported the conference action to the Senate as follows:

> (8) Supervisors: Both the House bill and the Senate amendment excluded supervisors from the individuals deemed to be employees for the purposes of the act. There was a sharp divergence between the House and Senate, however, with respect to the occupational groups which fell within this definition. *The Senate Amendment, which the conference ultimately adopted, is limited to bona fide supervisors.* The House had included numerous other classes. . . .

> *The Senate Amendment confined the definition of supervisor to individuals generally regarded as foremen and employees of like or higher rank.* [Leg. Hist. at 1537; emphasis added.]

The House conferees conceded defeat in their report: "The conference agreement, in the definition of 'supervisor,' limits such term to those individuals treated as supervisors under the Senate amendment." *Id.* at 539.

(e) The sections of the Taft-Hartley Act pertaining to professional employees had a much less tortuous route through the legislative process than the section relating to supervisors. The House bill, both as reported by the Education and Labor Committee and as passed by the House, contained no definition of professional employee, but did contain a reference to such employees in a section specifying special representation procedures. H.R. 3020 as reported, § 9(f)(2), Leg. Hist. at 62; H.R. 3020 as passed House, § 9(f)(2), Leg. Hist. at 189. The Senate bill, as reported and as it passed the Senate, contained essentially the same definition of "professional employee" as in the final Act. S. 1126 as reported, § 2(12), Leg. Hist. at 104-05; H.R. 3020 as passed Senate, § 2(12), Leg. Hist. at 232-33.

The House Committee report did not separately discuss professional employees. The Senate Committee report, however, provides some insight into the purpose of defining professional employees specially in the statute and providing tailored election proceedings:

> Although there has been a trend in recent years for manufacturing corporations to employ many professional persons, including *architects, engineers, scientists, lawyers, and nurses*, no corresponding attention was given by Congress to their special problems. Nevertheless such employees have a great community of interest in *maintaining certain professional standards*. [S. Rep. No. 105 on S. 1126 at 11, Leg. Hist. at 417.]

See also id. at 19, Leg. Hist. at 425 ("the committee was careful in framing a definition to cover only strictly professional groups such as engineers, chemists, scientists, architects, and nurses.")[10]

The Conference Committee report incorporated "the same definition of 'professional employee' as that contained in the Senate amendment" and "accord[ed] to this category the same treatment which was provided for them in . . . the House bill." H. Conf. Rep. No. 510 on H.R. 3020 at 36, Leg. Hist. at 540. The House Conference Committee Report explained that "[t]his definition in general covers such persons as legal, engineering, scientific and medical personnel *together with their junior professional assistants.*" *Id.* at 36, Leg. Hist. at 540 (emphasis supplied). Thus, there was express recognition of the fact that professional employees *do* often have "assistants", and would retain their employee status nonetheless.

(f) As anticipated, the Taft-Hartley bill was vetoed by President Truman. Leg. Hist. at 915-22. The veto was overridden by a vote of 331-83 in the House, *id.* at 922-23, and a vote of 68-25 in the Senate, *id.* at 1657. Accordingly, the Taft-Hartley Act became law.

(3) *Post-1947 Application of § 2(11)*: Following passage of the LMRA, the consequences of classifying an individual as a supervisor had changed, but the need to differentiate between "supervisors" and statutory "employees" had not. Recognizing that "[t]he definition of supervisors contained in section 2(11) of the act as amended is substantially a codification of the definition formulated and uniformly applied by the Board for several years before the amendment of the statute" (Thirteenth Annual Report 38 (1948) (footnotes omitted)), the Board continued to hold—as Congress had specifically intended—

[10] These explanations are noteworthy in that they make clear that Congress specifically intended to cover the very groups that traditionally work with clerical or technical assistants. *See* pp. 11-12, *supra*.

that minor supervisory duties do not automatically make an employee a supervisor, particularly where those duties involve only the direction of other employees. *George Ehlenberger and Co.*, 77 NLRB 701, 703 (1948) ("leadmen" whose "duties involve the direction or guidance of other employees in the course of production operations"); *H.J. Heinz Co.*, 77 NLRB 1103, 1105-06 ("head cooks" who "spend approximately 90 percent of their time doing manual work, and . . . 10 percent of their time . . . instructing other employees in the department" and a "leadman" who spends "approximately 50 percent of his time . . . doing manual work, and approximately 10 percent of his time . . . directing the work of his crew"); *The Austin Co.*, 77 NLRB 938, 943 (1948) (engineering department employees who "may assign and guide the work of certain of their professional colleagues" but who actually "are no more than group leaders").

The Board has since the early post-Taft Hartley cases continued to view the governing statutory distinction as one between individuals with the limited authority over the work of other employees characteristic of "leadmen" and similar employees, and the "*real* power in the interest of the employer' to take *meaningful* action with respect to the statutory tests' " (*International Union of United Brewery v. NLRB, supra*, 298 F.2d at 303 (emphasis supplied)) characteristic of the true supervisors Congress intended to exclude from the Act.[11] And the courts have, in the main, left it to the Board to draw this elusive line, recognizing that "the gradations of authority 'responsibly to direct' the work of others from that of general manager or other top executive to 'straw boss' are . . . infinite and subtle." *Marine Engineers Beneficial Ass'n v. Interlake Steamship Co.*, 370 U.S. 173, 179 n.6 (1962), (quoting *NLRB v. Swift & Co.*, 292 F.2d 561, 563 (1st Cir.

[11] *See, e.g., Injected Rubber Products Corp.*, 258 NLRB 687, 688-92 (1981); *Aquatech, Inc.*, 297 NLRB 711, 716-17 (1990), *enf'd*, 926 F.2d 538 (6th Cir. 1991).

1961)). *See also Food Store Employees Local 347 v. NLRB*, 422 F.2d 685, 690 (D.C. Cir., 1969) ("the finely-shaded gradations of power in any enterprise proscribe a wooden reading of Section 2(11). Almost any employee "directs" other employees in some fashion at some time."); *NLRB v. Security Guard Service, Inc., supra*, 384 F.2d at 149 ("[s]ome kinship to management, some emphatic relationship between employer and employee must exist before the latter becomes a supervisor for the former"); *NLRB v. Southern Bleachery & Print Works, Inc.*, 257 F.2d 235, 239 (4th Cir. 1958), *cert. denied*, 359 U.S. 911 (1959) (question is "whether the individual is merely a superior workman or lead man who exercises the control of a skilled worker over less capable employees or is a supervisor who shares the power of management.").

This general approach to reconciling the tensions within the statutory language and structure, which carries out Congress' intent as expressed consistently during the Taft-Hartley deliberations, was applied as well, before the 1974 NLRA health care amendments, to the health care industry. In *Doctors' Hospital of Modesto, Inc.*, 183 NLRB 950 (1970), for example, the Board held that nurses do not necessarily become supervisors simply because they "inform other, lesser skilled employees as to the work to be performed for patients and insure that such work is done," where such direction is "soley a product of their highly developed professional skills and do[es] not, without more, constitute an exercise of supervisory authority in the interest of their Employer." *Id.* at 951. Analogizing such nurses to "[t]he leadman or straw boss [who] may give minor orders or directives or supervise the work of others but . . . is *not necessarily* part of management and a supervisor under the Act," the Ninth Circuit upheld the Board's conclusion. *NLRB v. Doctors' Hospital of Modesto, Inc.*, 489 F.2d 772, 776 (9th Cir., 1973) (empasis in original). *See also id.*, citing various "leadmen" and similar cases, including *NLRB v. Security Guard Service, supra.*

It was only a few months after the Ninth Circuit decision in *Doctors' Hospital of Modesto* that committees of both the House and the Senate considered whether to modify the definition of "supervisor" in the course of amending the NLRA to cover nonprofit hospitals. Organizations of health care professionals had argued for a clarifying amendment while *Doctors' Hospital* was before the Ninth Circuit, noting that health care professionals tend to work in patient care teams, with higher skilled professionals giving direction to lesser skilled employees as to the care of patients. *See* Hearings on S. 794 before the Subcomm. on Labor and Public Welfare, 93d Cong., 1st Sess. (1973) at 122 (Statement of American Nurses' Assn.); *id.* at 296 (Statement for the Committee of Interns and Residents).

Both the House Committee and the Senate Committee considering the health care amendments "studied [supervisor] definition with particular reference to health care professionals" and "conclude[d] that the proposed amendment is unnecessary *because of existing Board decisions.*" S. Rep. No. 93-766, 93d Cong. 2d Sess. 6 (1974), *reprinted in* Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974 ("1974 Leg. Hist."), at 13 (emphasis supplied); H.R. Rep. No. 93-1051, 93d Cong. 2d Sess. 7 (1974), 1974 Leg. Hist. at 275 (emphasis supplied):

> The Committee notes that the Board has carefully avoided applying the definition of 'supervisor' to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients, and *thus is not the exercise of supervisory authority in the interest of the employer.* [1974 Leg. Hist. at 13, 275 (emphasis supplied).]

(4) *The Lessons*: In *Yeshiva* this Court cited the 1974 congressional committee reports, as well as the Board and Ninth Circuit opinions in *Doctors' Hospital*, as support for its conclusions that the Board's general approach to dividing professional employees from supervisors "aligned

with management . . . accurately captures the intent of Congress." 444 U.S. at 690 & n.30. The statutory language and legislative materials reviewed above amply confirm the *Yeshiva* Court's conclusion.

First, the legislative history squarely shows an intention to draw a line specifying that "individuals generally regarded as foremen and employees of like or higher rank" (Leg. Hist. at 1537), are "supervisors" and leaving individuals with only a minor supervisory role as "employees" covered by the Act. And, the "leadman" and "strawman" examples cited by critical members of Congress indicate, in particular, that day-to-day on-site direction by higher skilled employees of lesser skilled ones is *insufficient*, either standing alone or combined with the routinized exercise of other statutory supervisory attributes, to meet the § 2(11) definition of "supervisor".

Second, the statutory language, while ambiguous and potentially internally inconsistent, is certainly subject to a rational reading consistent with this conclusion. In particular, the term "in the interest of the employer", as noted, *cannot* be read to denote simply advancing the employer's interests. *See* pp. 6-8, *supra*. It is therefore reasonable to view that phrase, as the Board and the 1974 Congressional committees have done, as indicating that any activities otherwise conferring supervisory status must be intended to, and be perceived as, significantly advancing *management's* labor relations interests as opposed to advancing the overall business of the enterprise, in this instance patient care.[12] Similarly, in applying the "in

[12] One Board Regional Director in a health care case put this point well:

> In following this dictate of congressional intent, it may be that the Board has at times explained its rationale for deciding that certain powers exercised by health care professionals or technicals did not constitute supervisory authority by accentuating a dichotomy between that authority exercised on behalf of the employer and that exercised in the interests of patient care. . . . It is obvious, however, that Congress and certainly the Board did not intend a mutually exclusive dichotomy. Indeed, as set out by Congress, this test ["in the interest of the employer"] is simply another way of asking the question put in any case involving the issue of supervisory status: Does the individual identify with the interests of the employer, rather than with the interests of employees. [*Beverly Enterprises*, 275 NLRB 943, 946 (1985) (Regional Director's Report)].

dependent judgment" qualifying phrase in the "supervisor" definition, it is sensible to exclude the exercise of "professional" judgment, as opposed to "managerial" judgment.[13] Finally, in determining whether or not an individual is a supervisor on the basis of the "responsibly to direct" prong of the "supervisor" definition alone, it is, for reasons surveyed previously, rational to view that prong as adding to the § 2(11) class of supervisors only individuals who, like traditional industrial foremen, have

[13] To illustrate: In giving direction to secretaries concerning what work to do and how to do it, attorneys are exercising, ordinarily, simply their professional judgment, in an effort to get their own jobs done properly. Such exercise of judgment should not count as the kind of "independent judgment" necessary to come within the "supervisor" definition. On the other hand, the determinative exercise of independent judgment regarding how many secretaries to hire, how much to pay them, or whether or not to discipline them for coming in late is not directly connected to the practice of law, and could trigger supervisory status.

We note that this distinction between direct job-related independent judgment and other kinds of independent judgment should not be limited to professional employees. The definition of professional employees was included in the statute for a particular, unit-determinative reason, and was certainly not intended to indicate that some non-professional employees do not as well routinely exercise independent judgment in the performance of their jobs. Craftspersons, for example, exercise such judgment as to their craft. And, as noted, the lead person cases Congress expressly approved recognize that highly skilled employees may exercise judgment connected to that skill in giving direction to less skilled employees without becoming statutory supervisors.

Once again, our point is that the professional employee definition is useful in delineating the reach of the supervisor exception, not that there is a special rule regarding supervisory status for professionals.

in their sole charge and as a primary responsibility the *major* decisions concerning what work is to get done, when it gets done and how it gets done.[14] If not so read, Congress' express intention to leave within the Act's coverage individuals who have a minor role in providing on-site directions to other individuals employed by the employer would be negated.

The endpoint of this analysis is that there is no formulaic answer to the question whether or not particular individuals are "supervisors" based upon their direction of other employees. Rather, Congress intended that the determination of this question remain with the Board, which is to decide whether all the circumstances indicate that individuals said to be supervisors exercise the level of responsibility with respect to the direction of other employees that truly places in the ranks of management, or, instead, the level of responsibility that truly places them in the ranks of highly skilled "employees" performing, incidentally to their primary employee work tasks, a minor supervisory role.

This Court has left similar determinations to the Board even when there is *no* express statutory guidance as to the governing indices of managerial status. *NLRB v. Bell Aerospace Co., supra*, 416 U.S. at 289-90 & n.19 (remanding to the Board to determine whether a particular class of employees comes within the *implied* statutory exclusion of managerial employees without any labor relations responsibilities, and noting that "the Board has

[14] To recapitulate in this regard: "Responsibly" cannot mean simply the exercise of nonroutine judgment, since that requirement is independently contained in the definition; it cannot mean only accountability, since professionals are necessarily accountable for their work product, whether produced with the aid of assistants or not; and it cannot justify a narrow focus upon whether or not there are other on-site supervisors to second-guess the directions given, since there is a separate statutory provision regarding the effectiveness—as opposed to the level of ultimate responsibility—of any directions given. *See* pp. 8-10, *supra*.

had ample experience in defining the term 'managerial' in the manner which we think the Act contemplates. . . . [by focusing on] the employees' actual job responsibilities, authority, and relationship to management.") The "gradations . . . infinite and subtle" (*Marine Engineers Beneficial Association v. Interlake Steamship Co., supra*, 370 U.S. at 179 n.6), within hierarchical organizations are no more so when the task is to apply the express provision governing supervisory status than when it is to apply the implied managerial exception. In both instances the warrant and the need is to entrust to the administrative process the drawing of the line between "management" and "employees."

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Sixth Circuit should be reversed and the Decision and Order of the NLRB should be enforced.

Respectfully submitted,

MARSHA S. BERZON
SCOTT KRONLAND
177 Post Street, Suite 300
San Francisco, CA 94108

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390